



Including Revitalization in EPA's Clean Up Mission

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Susan Bromm
Deputy Director
Office of Site Remediation Enforcement
US EPA



Overview

- Use of **Prospective Purchaser Agreements (PPAs)**
 - Superfund
 - RCRA
- **Comfort /Status** Letters
- **Municipal Liability**
- **Supplemental Environmental Projects**
- **Parceling at RCRA Sites**

Prospective Purchaser Agreements

- Since its inception in 1980, the Superfund program has focused on the timely and efficient assessment, investigation, and cleanup of hazardous waste sites.
- Recently EPA, in collaboration with other stakeholders, has accelerated cleanup efforts and expanded its mission to enable the reuse of contaminated properties.
- EPA's enforcement and compliance assurance program has been an integral part of these efforts by clarifying environmental liability for parties interested in returning contaminated property to productive use.

Prospective Purchaser Agreements

- See U.S. EPA's *Prospective Purchaser Agreements and Comfort/Status Letters: How Effective Are They? Final Report* September 29, 2000. OSRE Publication Number 330R00002
- In June 1989, EPA issued the *Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, de minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property* (the 1989 Guidance).

PPA Requirements Under the 1989 Guidance

- EPA anticipates taking an enforcement action at the site;
- EPA will receive a substantial benefit for cleanup, which would not otherwise be available;
- The continued operation of the site or new site development with the exercise of due care will not aggravate or contribute to the existing contamination or interfere with the remedy;
- Due consideration has been given to the effect of continued operations, or new site development, or health risks to those likely to be present at the site;
- The prospective purchaser is financially viable.
- Only 20 PPAs were issued under this policy until 1995.

Administrative Reforms of 1995

- Included the Brownfields Economic Redevelopment Initiative leading OECA/OSRE to issue, in May 1995, its *Guidance on Settlements with Prospective Purchasers of Contaminated Property* (the 1995 Guidance).
- Change in two criteria from the 1989 Guidance.

1995 Changes

- An EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the Agency.
 - EPA may now provide PPA's at sites that are listed or proposed for listing on the NPL; or sites where EPA has undertaken, is undertaking, or plans to conduct a response action.
- The Agency receives a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA.
 - Under this more balanced approach, indirect benefits may include, the creation or retention of jobs, development of abandoned or blighted areas, creation of conservation or recreation areas, or provision of community service.

1995 Changes (cont.)

- The 1995 Guidance also provided for greater public participation.
- Since this change, over 150 PPA's have been issued.



Source: DeLuca, Hoffman & Associates

A conceptual drawing of the future shopping center at the Raymark Industries, Inc., Superfund Site.

Benefits of PPAs

- PPA's have enabled EPA and private parties to successfully clean up and reuse Superfund sites and generally met the needs of the purchasers. PPA's were not hindered by the size, type, stage, or cost of the cleanups.
- According to the 2000 Report, PPA's were issued for sites where cleanup costs were from less than \$100,000 to over \$20M.
- PPA's help local communities revive their neighborhoods. The 2000 PPA Report states that 1700 short term and 1700 permanent jobs have been created at Superfund PPA sites. Additionally, redevelopment projects associated with PPA's have an average value of \$5.7M - \$6.0 M and investment value of \$159M - \$ 184.4M.

Another Benefit

- Another benefit found with Superfund PPA sites is that PPA's support diverse uses at properties of varying sizes. Superfund PPA sites have ranged from less than an acre to greater than 50 acres.
- The Superfund experience is that traditional manufacturing, retail or office space, as well as recreational and green space were the reuse mechanism of choice.



More Benefits

- PPAs enhanced the economic viability of the reuse projects in that they aided tax incentives, loans, or other financial opportunities.



A portion of the Denver Radium Superfund site has been cleaned up and returned to productive use with the construction of The Home Depot store.

Impact of the New Brownfields Law on CERCLA PPAs

- Section 222 exempts bona fide prospective purchasers (and their tenants) from owner or operator liability under CERCLA so long as the person does not impede the performance of a response action or natural resource restoration.
- Provides the US with a lien on the property if the US has unrecovered response costs and the response action increases the fair market value of the facility.
- Does not address RCRA Liability of Prospective Purchasers.

Impact of the New Law

- On May 31, 2002, OSRE issued guidance on CERCLA PPA's, saying "In light of the new amendments, effective as of the date of enactment purchasers should no longer need PPAs with the Federal Government in order to complete the vast majority of real estate transactions involving contaminated property."

The Use of RCRA PPAs in Brownfields Redevelopment

- Prospective Purchaser Agreements (PPAs), while having an extensive history at Superfund sites, have been used only in limited circumstances at RCRA sites.
- Because RCRA does not provide independent authority to EPA to resolve liability issues, DOJ involvement and concurrence is required.

Examples of RCRA PPAs

- Genicom
- Sterling Steel/Leggett & Platt, Inc.
- Additional details about these examples in the RCRA & Revitalization panel tomorrow



Common Elements of RCRA PPAs

While no formal national policy has yet been developed by EPA regarding RCRA PPAs, these PPA's had the following common elements:

- Owner/operator is bankrupt;
- New purchaser will reuse or redevelop the site, providing a benefit to the community;
- The property gets cleaned up.

States Are Using RCRA PPAs in Brownfields Redevelopment

- Florida's work at Envirotech, S.E. will be discussed in tomorrow's RCRA & Revitalization panel.



Comfort/Status Letters

- In an effort to respond to the many requests from private parties for information concerning their potential liability, EPA issued the *Policy on the Issuance of Comfort/Status Letters* in 1996.
- Comfort/status letters--
 - Provide a party with any releasable information EPA has about a particular property;
 - Explain what the information means; and
 - Outline EPA's intentions about the property.

Criteria for Issuing a Comfort Letter

- The comfort/status letter will facilitate the cleanup and redevelopment of brownfield properties;
- There is a realistic perception or probability of an interested party incurring Superfund liability at the site; and
- No other mechanism is available to address the party's concerns.

Comfort/Status Letters Do NOT

- Express EPA's opinion as to possible contamination or extent of contamination at a property, where EPA has no knowledge about a property other than as previously noted — sharing information in EPA's files;
- Provide any information or obligations associated with ownership or operation of a site;
- Limit or affect EPA's authority under CERCLA or any other law or provide a release from CERCLA liability.

Examples of Comfort Letters

- No Previous **Federal** Superfund Letter
- No Current **Federal Superfund** Interest Letter
- Federal Interest Letter
- **State Action Letter** - state has the lead for the day-to-day activities and oversight of a response action.

Benefits to Local Communities

- As of 2000, 470 short term jobs (construction related) have directly resulted from comfort/status letters and 2,500 permanent jobs have directly resulted from the subsequent redevelopment projects;
- Average value of redevelopment projects resulting from a comfort letter is \$4,665,217 with \$107.3M (excluding cleanup costs) has been invested in these projects;
- Over 80% of these projects would not have occurred without the comfort letter.
- Several states, including Georgia, Maine, and Missouri indicated in a recent ASTSWMO survey that the issuance of a comfort/status letter by EPA was instrumental in several of their brownfields redevelopment projects.

Enhance the Economic Viability of Reuse Projects

- Comfort/status letters are a relatively fast and inexpensive tool to facilitate brownfield redevelopment
 - Comfort/status letters can be completed relatively inexpensively, providing the recipients with reassurance that they can proceed with redevelopment work with a clear understanding of their potential liability.

RCRA Comfort/Status Letters

- Based on the success of the Superfund Comfort Letter policy, EPA adopted the concept of comfort/status letters as they apply to RCRA TSD facilities. In many cases, a “comfort letter” will suffice instead of a PPA.
- Criteria for issuance of RCRA Comfort/status letters
 - Where they may be used to facilitate and cleanup brownfields;
 - There is a realistic probability of EPA initiating a RCRA cleanup;
 - There is no other adequate mechanism available to adequately address the party’s concerns.
- The examples of Superfund comfort/status letters can be used for analogous RCRA sites.

Other Considerations

- **Comfort/status letters are provided solely for informational purposes;**
- **They relate only to EPA's intent to exercise its RCRA corrective action response and enforcement authorities at a property based on information currently known to the agency;**
- **EPA encourages the release of as much information as possible to enable the party to better understand the potential applicability of RCRA cleanup requirements.**
- **Other than providing available information, this policy is not intended to express EPA's opinion as to possible contamination or the extent of that contamination.**
- **Comfort/status letters are not intended to limit or affect EPA's, or state's, authority under RCRA or any other law or provide release from RCRA liability.**

Municipal Liability

- EPA is exploring mechanisms to relieve municipalities from liability when they acquire contaminated property through such functions as tax delinquency, the use of eminent domain, etc.
- Current Status:
 - CERCLA Defenses to Liability
 - § 107 (b)(3) - Acts caused by a third party and municipality acquires property;
 - § 101(20) - The term owner does not include a [municipality] which acquires property through bankruptcy, tax delinquency, abandonment, or other involuntary acquisition by virtue of its capacity as a sovereign.
 - RCRA
 - Subtitle I of RCRA provides a statutory exemption for lenders from cleanup liability for releases from petroleum UST's.

Pilot Program in Wisconsin



- EPA Region 5 approved a pilot program for Municipal/Lender Liability Relief under Wisconsin Law based on the following criteria:
 - Enforcement discretion would be approved on a case-by-case basis;
 - Municipality/lender must be interested in purchasing contaminated property;
 - Municipality/lender did not contribute to the contamination of the site.

Wisconsin Pilot Process

- Municipality/lender must request written clarification of Wisconsin's Hazardous Waste law;
- Municipality/lender must submit information on property to be acquired to WDNR;
- If municipality/lender met certain criteria under Wisconsin's Lender Liability rule, then an exemption, under WDNR's enforcement discretion authority, for liability could be applied to the municipality/lender.
- So far there have been no applications for the exercise of this exemption.

Supplemental Environmental Projects to Facilitate Brownfields Redevelopment

- In April 1998, EPA issued the final “Supplemental Environmental Projects Policy.” In that policy EPA encourages the use of SEPs in the settlement of environmental enforcement actions.
- In September 1998, EPA issued a complementary policy wherein SEPs can be used to assess cleanup of brownfields to enhance environmental quality and economic vitality of areas in which enforcement actions were necessary.

Two Categories of SEPs Appropriate for Brownfields

- **Environmental Quality Assessment Projects**

- Includes investigating and monitoring

- **Environmental Restoration Projects**

- May involve removal or remediation of contaminated sites

Criteria for Using SEPs

- SEPs at Brownfields Cannot Include Action that the Defendant/Respondent is Otherwise Legally Required to Perform
 - Restriction includes actions the defendant/respondent is likely to be required to perform as injunctive relief or as part of an order or existing settlement.

SEP Criteria (cont.)

- SEPs at Brownfields Require an Adequate “Nexus” between the Violation and the Project
 - A SEP at a brownfield will generally satisfy the nexus requirement if the action enhances the overall public health or environmental quality of the area put at risk by the violation.
 - It can be at the same ecosystem and is not limited to the actual facility where the violation occurred.
 - A relationship between the statutory authority for the penalty and the nature of the SEP is not required in order for the nexus test to be met.

SEP Criteria (cont.)

- **SEPs at Brownfields Cannot Include Action that the Federal Government is Likely to Undertake or Compel Another to Undertake**
- SEPs are generally not acceptable at NPL sites, sites where the EPA is planning or conducting a removal action, or sites where the defendant/respondent is likely to be ordered to perform an assessment, response, or remediation pursuant to CERCLA.

SEP Criteria (cont.)

- **SEPs may be Performed at Brownfields Involuntarily Acquired by Municipalities**
 - A SEP would be appropriate at a brownfield site involuntarily acquired by a local government, there are no other potentially liable parties, and the level of contamination would not compel the Agency to take action itself.
- **SEPs May Be Limited at Brownfields that Receive Federal Funds**
 - A SEP cannot provide additional funds to an entity that has already received federal funds for a specific brownfields project

Brownfields SEP Example at Sherwin-Williams

- As part of its **1997 consent decree**, the Sherwin-Williams resin and paint facility in southeast Chicago agreed to perform **two SEPs to improve the environment in the surrounding community**;
- One of these was to cleanup (**statutory nexus**) and help **redevelop**, at a cost not to exceed **\$850,000**, a **brownfields site**, the Victory Heights/West Pullman section of the city;
- The **130 acre site**, about a mile from the paint facility (**meeting the location nexus**), contains **vacant, partially demolished factories** and is **crisscrossed with active and inactive railroad tracks**;

Sherwin-Williams (cont.)

- This site was part of a larger brownfields redevelopment effort by the City of Chicago, thus increasing the likelihood of success;
- The surrounding neighborhoods are primarily minority;
- Significantly, the SEP addresses improving the quality of life for people in the neighborhood who have been and would be affected by any pollution generated by the Sherwin-Williams facility.

Brownfields SEP Example at Pennzoil-Quaker State Company

- As a result of the filing of a Complaint alleging RCRA violations against the Pennzoil-Quaker State Company (Respondent) , a Consent Agreement Final Order (CAFO) was filed on April 30, 2002;
- The CAFO required the Respondent to pay a civil penalty of \$134,418.00 and the performance of a Supplemental Environmental Project (SEP) for not less than \$100,000.00;
- The SEP provides for the removal and disposal of a storage tank and associated materials located on property that will eventually be developed into a 300,000 square foot convention center complex;

Pennzoil (cont)

- The property has been part of an industrialized area since the 1850's. From 1885 to 1946, a portion of the property was utilized by Shreveport Gas, Electric Light and Power Company (including the tank being removed under this SEP);
- The median family income for persons residing this vicinity in 1990 was \$4,999 while the median family income for the City of Shreveport was \$26,894;
- According to the 2000 Census, the African American population comprises 96% of the population of this area;
- The new convention center is expected to create and sustain over 1,100 jobs for the community

Parceling at RCRA Sites – Working Concepts

- **Reasons for Parceling**

- Allow redevelopment of at least some of potentially idle property
- Can generate money to cleanup contaminated portions

- **Concerns**

- Money is diverted from contaminated areas to owner's pocket, leaving possible bankrupted RCRA site which has potential to be a SF site.
- Selling clean property may have adverse effect on financial assurance.

Parceling (cont.)

- **Parceling at RCRA Permitted facilities.**
- **Parceling at Interim Status Facilities**
- **Other Issues: Who will ultimately be responsible for cleanup?**
- **Anticipated Date of Release: Winter 2003**
- **Greater detail on this issue at the RCRA & Revitalization panel tomorrow**